United Nations AT/DEC/1191

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1191

Case No. 1286: AERTGEERTS Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Omer Yousif Bireedo; Mr. Spyridon Flogaitis;

Whereas, on 4 March 2003, Roger Aertgeerts, a former staff member of the United Nations Development Programme (hereinafter referred to as UNDP), filed an Application containing pleas which read, in part, as follows:

"II: PLEAS

7. With respect to competence and procedure, the Applicant respectfully requests the Tribunal:

...

(c) *to decide* to hold oral proceedings ...

8. On the merits, the Applicant respectfully requests the Tribunal:

(a) *to rescind* the decision of the Secretary-General not to renew the Applicant's fixed-term appointment;

(b) *to rescind* the decision of the Secretary-General rejecting the unanimous recommendation of the Joint Appeals Board [(JAB)] awarding compensation to the Applicant;

...

(d) *to order* the Applicant's reinstatement in service as from 1 September 1999;

(e) *to award* the Applicant appropriate and adequate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof;

(f) *to fix* ... the amount of compensation to be paid in lieu of specific performance at three years' net base pay in view of the special circumstances of the case;

(g) *to award* the Applicant as cost, the sum of $7,500.00 in legal fees and $500.00 in expenses and disbursements."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 7 July 2003 and periodically thereafter until 5 December 2003;

Whereas the Respondent filed his Answer on 4 December 2003;

Whereas the Applicant filed Written Observations on 25 February 2004 and the Respondent commented thereon on 14 April 2004;

Whereas on 28 April 2004, the Respondent submitted an additional communication;

Whereas on 27 May 2004, the Applicant commented on the Respondent's communication of 14 April and, on 17 June 2004, the Respondent submitted an additional communication;

Whereas, on 2 July 2004, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant joined UNDP on a two-year fixed-term appointment as a Project Management Officer at the P-5 level, with the Office of Project Services (OPS), on 18 October 1992. The Applicant's appointment was subsequently extended for six months and again for three months.

On 12 April 1995, the Applicant requested that the three-month extension of his appointment be reconsidered and that he be granted a two-year appointment instead. The Applicant's 1994 performance appraisal report (PAR) rated his performance as "fully satisfactory". Effective 18 July 1995, he was granted a one-year extension of his

appointment, which appointment was subsequently extended on an annual basis, through 17 July 1999.

In July 1998, the Applicant and his supervisor completed their respective parts of the Applicant's Performance Profile for 1997. In his evaluation, the Applicant's supervisor stated that the Applicant "[deserved] highest credit," and that his achievement in completing a voluminous final report "could probably not be matched by any other Project Management Officer." Nevertheless, the supervisor expressed his concerns regarding the Applicant's relationships with clients, stating, inter alia, that "during the past year, unfortunately a number of explicit requests were received from different clients to have their projects switched to other Project Management Officers. This has become a serious issue which needs to be addressed urgently."

In his final comments on his performance Profile, the Applicant states, inter alia:

> "Over the period under consideration, my supervisor has indeed informed me verbally that such complaints existed, however, I have never seen the actual complaint, nor have I been allowed to respond directly or to assist in drafting a response. ..."

Subsequently, the Management Review Group (MRG), having noted the supervisor's generally positive assessment of the Applicant's performance, concluded that he had difficulties in dealing with his clients, "which could potentially lead to a loss of business for the Organization". The MRG did not endorse any further extension of the Applicant's contract beyond its expiration date. The MRG further stated that consultations between UNOPS and the Applicant should be held to inform the latter of his "short fall vis-à-vis the clients".

Following receipt of the MRG's comments, on 23 February 1999, the Applicant submitted a rebuttal thereof, annexing letters from clients, expressing their support. Two of these clients had been mentioned by the MRG as having requested that their projects be reassigned from the Applicant.

On 30 July 1999, the Rebuttal Panel submitted its report, determining that it was not within its mandate to evaluate the decision not to extend the Applicant's contract, however concluding that "management has been deficient, perhaps even insensitive, in the way it has dealt with the staff member's assessment and contract extensions over the past five years" and that "management could have been more systematic in documenting [the Applicant's] shortcomings and in counseling and assisting [him]".

On 31 August 1999, the Applicant separated from service.

On 19 February 2000, the Applicant requested the Secretary-General to review the administrative decision not to extend his fixed-term appointment

On 7 May 2000, the Applicant lodged an appeal with the Joint Appeals Board (JAB) in New York. The JAB adopted its report on 21 June 2002. Its conclusions and recommendations read, in part, as follows:

> *"Conclusions and recommendations*
>
> 23. In light of the foregoing, the Panel *unanimously agreed* that there was adequate evidence of exceptional circumstances to warrant a waiver of the two-month time limit in the present case.
>
> 24. The Panel also *unanimously agreed* that there was no adequate evidence of prejudice or other extraneous factors in the taking of the contested decision.
>
> 25. The Panel further *unanimously agreed* that the Appellant's PAR process for 1997 was conducted in accordance with UNDP's PAR procedure.
>
> 26. Nonetheless, the Panel agreed with the PAR rebuttal panel that the UNOPS Management had failed to systematically document the Appellant's shortcomings and timely draw his attention to the need to improve his performance. The Panel thus *unanimously recommends* that the Appellant be paid one-month net base salary in effect at the time of his separation for the damages caused by such failures on the part of UNOPS Administration.
>
> 27. The Panel also *unanimously recommends* that the report of the PAR rebuttal panel in the case of the Appellant be placed alongside his PAR for 1997 in his Official Status File, if this has not already been done.
>
> ..."

On 30 December 2002, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

> "... [T]he Board [has] concluded that ... Management had failed to systematically document your shortcomings and timely draw your attention to the need to improve your performance. For the damage caused to you by such failure, the Board recommended that you be paid one month net base salary in effect at the time of your separation from [service]. The Secretary-General regrets that he cannot agree with the Board regarding this issue. The record makes clear that the concerns of ... Management about your working relationships with clients were brought to your attention starting with your 1994 PAR and, according to your own statements in the file, you were subsequently informed verbally and in writing of continuing concerns. The Secretary-General has accordingly decided not to accept the Board's recommendation regarding compensation for damages."

On 4 March 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision not to extend the Applicant's appointment was tainted by prejudice and other extraneous considerations and was not adequately examined by the JAB or the Rebuttal Panel. The reasons set forth for alleging sufficient justification for not extending the appointment were not well founded and were refuted; therefore the decision cannot meet the requirements of good faith and fair dealing that are inherent in the Staff Regulations and Rules.

2. The Applicant's rights of due process were violated and there were significant procedural irregularities and undue delays in his case.

3. The Respondent failed to consider the Applicant for permanent appointment, even though he had served satisfactorily on successive fixed-term contracts for more than five years. The Respondent also failed to afford the Applicant fair consideration for other available posts.

Whereas the Respondent's principal contentions are:

1. The decision not to renew the Applicant's fixed-term appointment constituted a proper exercise of discretion.

2. The decision not to renew the Applicant's fixed-term appointment was not vitiated by improper motives or extraneous factors.

3. The Applicant is not entitled to reinstatement or compensation.

The Tribunal, having deliberated from 2 to 23 July 2004, now pronounces the following Judgement:

I. The Applicant joined the Organization on 18 October 1992, on a two-year fixed-term appointment as a Project Management Officer at the P-5 level. His contract was extended several times, until 31 August 1999, when the Applicant separated from service on the expiration of his last contract. As of 1 September 1999, the Applicant has been working for WHO's European Centre for Environment and Health.

The Applicant's service with the United Nations can be divided into two phases: the first phase, covering the period beginning with the Applicant joining the Organization and continuing through July 1998; and the second phase, covering the remaining period of the Applicant's employment with the Organization, through August 1999.

It seems that during the first period, the Applicant's supervisor had no complaints regarding the Applicant's performance. For example, his PAR for the year 1994 rated the Applicant's performance as "fully satisfactory". However, the situation seems to have changed and, in his Performance Profile for the year 1997, while stating that the Applicant deserved the "highest credit", his supervisor expressed his concerns regarding the Applicant's relations with clients. On the basis of the supervisor's assessment, the MRG, while noting the generally positive assessment of the Applicant's performance, expressed its concerns regarding the difficulties he was reportedly having in maintaining good relationships with clients. In its comments, the MRG identified specific clients who, allegedly, had been having difficulties in dealing with the Applicant. The MRG was particularly worried that these interpersonal problems could present a potential risk of loss of business for the Organization. The Applicant's last contract extension had been for a one-year period, and the MRG decided not to further renew his contract.

The Tribunal notes that the Applicant had submitted evidence from those clients cited by the MRG as having complained of difficulties in dealing with him, whereby they contradict the MRG's statement and express their appreciation for the Applicant's contribution to projects on which they had cooperated with him. These same clients provided a positive feedback regarding their work relations with the Applicant.

On 23 February 1999, the Applicant rebutted his 1997 PAR. The Rebuttal Panel concluded that the Administration had been deficient in its handling of the Applicant's assessment and contract extensions and that it could have been more systematic in documenting the Applicant's shortcomings and in counselling and assisting him.

The Applicant subsequently lodged an appeal with the JAB, challenging the decision not to renew his contract. Having considered his case, the JAB recommended that the Applicant be compensated for the Organization's failure to timely draw his attention to the interpersonal aspects of his performance, by one month net base salary. The JAB further recommended that the report of the PAR Rebuttal Panel be placed alongside the Applicant's PAR for 1997. The Secretary-General did not accept the JAB's recommendation regarding compensation.

II. It has been the long-standing jurisprudence of the Tribunal that, in general, fixed-term contracts do not carry any expectancy of renewal. The Tribunal has also repeatedly stated that the Organization does not have to provide any reason when deciding not to renew a fixed-term contract upon its expiration. However, as has also been repeatedly stated by the Tribunal, when the Administration chooses to give reasons for its decision not to renew a

fixed-term contract, the validity and acceptability of these reasons are subject to judicial review. In Judgement No. 1003, *Shasha'a* (2001) the Tribunal stated as follows:

> "II. The Tribunal has consistently held that, in general, an employee serving under a fixed term contract has no right to expect the renewal of the agreement, a conclusion dictated by staff rule 104.12(b). The Administration, in its discretion, may decide not to renew or extend the contract without having to justify that decision. Under those circumstances the contract terminates automatically and without prior notice, according to staff rule 109.7. (See Judgements No. 440, *Shankar* (1989); and No. 496, *Mr. B.* (1990).
>
> III. On the other hand, when the Administration gives a justification for this exercise of discretion, the reason must be supported by the facts. (See Judgement No. 885, *Handelsman* (1998).) Under such circumstances, the exercise of discretion is examined not under the rule enunciated in Judgement No. 941, *Kiwanuka* (1999) but for consistency between the reason offered and the evidence. ..."

In the present case, it is clear that professionally the Applicant had been highly regarded by his superiors for several years. In fact, in every aspect other than his relationship with clients, the Applicant consistently received praise from his supervisor. When the decision not to renew the Applicant's fixed-term appointment was then explained by his poor relations with clients and the financial risks involved with it, the Administration had to be able to substantiate these claims with the facts. As stated above, the Applicant had provided evidence to the contrary. The Tribunal therefore finds that the reason which served as the basis for the decision not to renew the Applicant's appointment had been disproved by the Applicant. Moreover, the Tribunal believes that the problems as identified in the report of the Rebuttal Panel, especially the failure of the Administration to document the Applicant's shortcomings and to counsel, guide, support and advise him, should have been dealt with much earlier. Rather than deciding that the Applicant's interpersonal problems were such that warranted losing a staff member who, professionally, was excellent, the Administration should have provided the Applicant with the necessary guidance to overcome this shortfall of his.

III. In view of the foregoing, the Tribunal:

1. Orders that the Applicant be paid as compensation six months' net base salary at the rate in effect at the time of this Judgement;
2. Orders that the report of the PAR Rebuttal Panel be placed alongside the Applicant's Performance Profile for 1997 in his Official Status File; and,

3. **Rejects all other pleas.**

(*Signatures*)

Julio **Barboza**
President

Omer Youssif **Bireedo**
Member

Spyridon **Flogaitis**
Member

Geneva, 23 July 2004

Maritza **Struyvenberg**
Executive Secretary

United Nations AT/DEC/1192

Administrative Tribunal

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30 September 2004

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1192

Case No. 1287: MBARUSHIMANA Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Brigitte Stern, Vice-President, presiding; Mr. Omer Yousif Bireedo; Mr. Spyridon Flogaitis;

Whereas, on 17 March 2003, Callixte Mbarushimana, a former staff member of the United Nations, filed an Application, requesting the Tribunal, inter alia:

"II. PLEAS

3.

...

(c) *to decide* to hold oral proceedings ...

4. On the merits ...

(a) *to rescind* the decision of the Respondent not to renew the Applicant's appointment and to separate him from service;

(b) *to find and rule* that the Joint Appeals Board [(JAB)] correctly held that the decision not to renew the Applicant's appointment violated his legitimate expectancy of further employment as well as the pertinent administrative issuances governing treatment of arrested and detained staff;

(c) *to order* that the Applicant be reinstated in service at the [International Field Limited Duration (IFLD)] 3-(A) level, with retroactive effect from 1 May 2001;

(d) *to award* the Applicant appropriate and adequate compensation on an exceptional basis in the amount of three years' net base pay for the actual, consequential and moral damages suffered by the Applicant as a

result of the damage to [his] career and professional reputation, for the denial of due process and fair treatment to which he was subjected and for the effects of the Respondent's prejudicial actions on him and his family;

(e) *to fix* ... the amount of compensation to be paid in lieu of specific performance at three years' net base pay in view of the special circumstances of the case;

(f) *to order* that a letter exonerating the Applicant of any wrongdoing be published and that all prejudicial materials relating to this case be removed from the Applicant's records;

(g) *to award* ..., as cost, the sum of $10,000.00 in legal fees and $500.00 in expenses and disbursements."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 July 2003 and once thereafter until 31 October 2003;

Whereas the Respondent filed his Answer on 5 September 2003;

Whereas the Applicant filed Written Observations on 30 December 2003, and, on 16 March 2004, the Respondent submitted comments thereon;

Whereas, on 13 May 2004, the Applicant submitted a further document, containing comments on the Respondent's 16 March submission and an additional plea as follows:

"3. (d) *to order* the Respondent to produce all the relevant correspondence in his possession dealing with the exchanges between the Rwandan Government and the Office of Legal Affairs prior to the Applicant's arrest".

Whereas, on 28 May 2004, the Respondent commented on the Applicant's communication of 13 May;

Whereas, on 1 July 2004, the Tribunal decided not to hold oral proceedings in the case;

Whereas the Applicant's employment history as set out in the report of the JAB in the case is as follows:

"According to the Personnel History that the Appellant filled out on 6 June 2000, between July 1992 and December 1994, he worked for the United Nations Development Programme (UNDP) in Kigali, Rwanda, as a Senior Information Assistant. From December 1996 to December 1999, he was with UNDP-Luanda, Angola, as a Local Area Network ... Manager. On 10 November 2000, he was recruited for [the United Nations Interim Administration Mission in Kosovo (UNMIK)] as an [Electronic Data Processing (EDP)] Assistant in Gjilan region at

> the IFLD 3-(A) level on an appointment of limited duration (ALD) through 30 April 2001. He was arrested on 11 April 2001. His ALD contract was subsequently not extended beyond 30 April 2001."

Whereas the facts in the case are as follows:

Sometime in 1999, in an undated "Statement of Concern", Mr. Gregory Alex, Human Policy Adviser, Office for the Coordination of Humanitarian Affairs, Rwanda, formerly, Chief, Emergency Unit, UNDP, Rwanda, made very serious accusations against the Applicant, referring to his role in the genocide and in the elimination and murder of scores of United Nations staff members and their families in Rwanda, in 1994. In particular, he was accused of being responsible for the death of UNDP's National Personnel Officer, Ms. Florence Ngirumpatse, and a number of refugees in the residence where they had taken refuge. The Applicant strongly refuted these allegations, in letters of 26 November 1999 and 22 February 2000 to the Administrator, UNDP, and the Secretary-General, respectively. On 29 June, he received a letter from UNDP, assuring him that "UNDP is as concerned as you are that the truth be uncovered and justice served". The record shows no further action taken.

Following his recruitment by UNMIK, on 10 November 2000, the Applicant signed his letter of appointment on 13 December. Section 5, "Special conditions", of the letter of appointment specified that:

> "[T]his appointment is non-career in nature. It carries no expectancy of renewal or of conversion to any other type of appointment in the United Nations, and does not entitle the holder to consideration for any position other than the one for which this contract was issued. An extension of this appointment may be issued subject to certain conditions established by the United Nations and subject to the agreement of yourself and the United Nations, but under no circumstances may the total tour of duty with the United Nations exceed four years."

On 7 February 2001, the Applicant's supervisor, rated the quality of his work as "good" and recommended an extension of the Applicant's appointment for six months, through 31 October 2001. On 8 February, the Applicant "concurred", in writing.

On 15 March 2001, the First Deputy Prosecutor of the Republic of Rwanda at the Court of First Instance of Kigali, Rwanda, issued an international arrest warrant seeking the arrest of the Applicant to prosecute him under Rwandan law for genocide

and crimes against humanity. The original warrant was delivered by the Permanent Representative of the Republic of Rwanda to the Under-Secretary-General for Legal Affairs of the United Nations. On 27 March, the original arrest warrant was delivered to the Legal Advisor, UNMIK. Following exchange of correspondence on the procedures to be followed, on 10 April, the Office of Legal Affairs (OLA) at Headquarters, advised the Legal Advisor, UNMIK, that the Secretary-General waived

> "the immunity from legal process and from arrest and detention that [the Applicant enjoyed] as an official of the United Nations and as a member of the personnel of UNMIK in so far as, and to the extent that, that may be necessary in order to permit him to be taken into custody, to be detained and to be subjected to legal proceedings with a view to his possible extradition to Rwanda to stand trial ..."

On 11 April 2001, the Applicant was arrested and placed in custody of UNMIK police. Following his arrest, an article appeared in a United Kingdom newspaper, "The Independent", which identified the Applicant by name and position, citing a United Nations spokesman, and reported details of the Applicant's arrest with a view to his possible extradition "to face charges of alleged involvement in the 1994 Rwanda genocide". The spokesman also claimed that the Applicant had been "let go" by UNDP in December 1999 in view of surfacing allegations relating to his activities in Rwanda; that his case had been submitted to the International Criminal Tribunal for Rwanda (ICTR); and, that he had falsified his application for his position with UNMIK by concealing his prior employment with UNDP.

On 12 April 2001, the Applicant was examined by Lis Sejr, Judge of the District Court of Gjilan, Kosovo. She found that "though no evidence of the alleged crime [had] been established ... the international arrest warrant [constituted] sufficient basis for ordering provisional detention"; decided that such provisional detention should be for the shortest possible period; and, ordered that the petition for extradition should be submitted to the court no later than 12 May 2001. Subsequently, she ordered an extension of the Applicant's provisional detention until 12 June, to allow the court to "evaluate the merits of the extradition petition".

On 24 April 2001, UNMIK informed the Applicant that:

> "[T]he Assistant Secretary-General for Human Resources Management has decided that, given the present circumstances, particularly the nature of the

> allegations against you, it would not be in the interest of the Organization to grant you a further extension when your current appointment expires on 30 April 2001".

On 6 June 2001, Judge Sejr refused the petition for the extradition of the Applicant. She concluded, inter alia, that "the Rwandan government [had] not provided sufficient evidence to support a reasonable suspicion that [the Applicant] committed the crimes in question"; that none of the witnesses had actually seen the Applicant commit any crimes or had any concrete knowledge that he committed genocide; and, that "relevant international human rights instruments would likely prohibit the extradition of [the Applicant]", in view of the inadequate guarantees of a fair trial in his country of origin. On 11 June, a Panel of three judges of the District Court of Gjilan sustained the analyses made by Judge Sejr. Subsequently, on 19 June, the Supreme Court of Kosovo approved the decision of the District Court of Gjilan; refused the request for the extradition by the Government of Rwanda; and, ordered the release of the Applicant from detention.

On 26 June 2001, the Applicant wrote to the Director of Administration, UNMIK, asking that, since the allegations made against him were found to be groundless, and in view of the irregularities in processing his case, he "be reintegrated into [his] job within UNMIK". In his follow-up letter of 20 July, the Applicant noted that, during his 70-day detention, UNMIK had failed to provide him with assistance "in contradiction with the applicable United Nations rules and guidelines in case of an arrested or detained staff member". As he had spent all his savings to pay his French legal counsel, he requested that he be paid salary and other entitlements for "April 2001 and subsequent months" as well as legal counsel fees, and that he be provided with a new laissez-passer. On 7 September, the Chief Civilian Personnel Officer, UNMIK, advised the Applicant that:

> "[A]s you face charges of genocide and crimes against humanity in your country of nationality, it would not be in the interest of the United Nations to rehire you until this matter is resolved, either by the charges being dismissed by the Rwanda Court or withdrawn by the Government. If this should occur, we would re-consider our decision."

On 25 September 2001, the Applicant wrote to the Secretary-General, requesting administrative review of the decision not to renew his appointment.

On 13 December 2001, the Applicant lodged an appeal with the JAB in New York.

On 11 September 2002, the Prosecutor, ICTR, dismissed the Applicant's case for lack of evidence. Subsequently, the Applicant wrote to the Special Representative of the Secretary-General, UNMIK, requesting reinstatement in light of the decision of the Prosecutor, ICTR. There is no response to this letter in the record.

The JAB issued its report on 20 November 2002. Its conclusions and recommendations read, in part, as follows:

> "***Conclusions and recommendations***
>
> 43. ... [T]he Panel *unanimously agrees* that the Appellant was prevented by the exceptional circumstances beyond his control to file a timely appeal against the decision of 24 April 2001, and that the two-month time limit should be waived so that the decision of 24 April 2001 may be reviewed in substance.
>
> 44. The Panel *also unanimously agrees* that, despite the express wording of no expectancy of renewal in his Letter of Appointment, the UNMIK Administration by its own conduct created a reasonable expectancy in the mind of the Appellant that his ALD would be renewed beyond 30 April 2001.
>
> 45. The Panel *further unanimously agrees* that by deciding to let his ALD lapse when the Appellant was in detention due to the arrest warrant and extradition request issued by the Government of Rwanda, the UNMIK Administration failed to comply with Annex B of ST/AI/299 [dated 10 December 1982, entitled 'Reporting of arrest or detention of staff members, other agents of the United Nations and members of their families']. Furthermore, it failed to uphold the universal principle of presumption of innocence until proven guilty and wrongfully ignored the reasonable expectancy of renewal that it had cultivated in the mind of the Appellant.
>
> 46. The Panel therefore *unanimously recommends* that the Appellant be paid [six months'] net base salary in compensation for the violation of his reasonable expectancy of renewal of his ALD. Additionally, it *unanimously recommends* that he be paid the salary for the month of April of 2001, if it has not already been done.
>
> 47. The Panel makes no other recommendation in respect of the present appeal."

On 22 April 2003, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him as follows:

> "The Secretary-General has carefully reviewed the Board's report. He does not agree with the Board's conclusion that you had a reasonable expectancy

for continued employment. The Board appears not to have taken into account a number of factors, including the short-term nature of your appointment; that it was your first such appointment without any prior extension; or the fact that no verbal or written commitments were made to renew it. In the Secretary-General's view, such factors could not have created a *reasonable* expectancy that your appointment would be renewed. In addition, the contested decision was not vitiated by any procedural irregularities, nor was it improperly motivated.

The Secretary-General also does not accept the Board's conclusion that you were wrongfully treated when your appointment was not extended following your arrest and detention. In that regard, the Secretary-General points out that your case does not come under the purview of the document entitled 'Arrested, detained or imprisoned staff members: administrative, contractual & disciplinary issues', which deals with situations of staff members arrested by Governments, whereas your arrest was effected by the United Nations. The Secretary-General has therefore decided not to accept the Board's recommendation for compensation.

..."

On 17 March 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant's right to be fairly considered for an extension of appointment was compromised by a rush to judgement that violated all accepted notions of fairness and due process. His contract would undoubtedly have been renewed but for his arrest: his arrest was the sole and precipitating factor in the decision not to renew his contract.

2. The non-renewal of the Applicant's contract was an improper exercise of the discretionary authority of the Respondent in that it was procedurally flawed and based upon extraneous political considerations.

3. At no time did the Respondent request, receive or review the evidence underlying the charges, before waiving the Applicant's immunity and executing the arrest warrant of the Rwandan authorities.

Whereas the Respondent's principal contentions are:

1. No rights of the Applicant were violated with regard to the decisions of the Respondent not to renew the Applicant's appointment or rehire him until the charges against the Applicant of genocide and crimes against humanity were dismissed or withdrawn.

2. The Applicant had no legitimate expectation of renewal of his appointment.

3. No due process or procedural rights of the Applicant were violated in the decision of the Administration. The Respondent's decision was based on the determination that it was not in the interest of the Organization to rehire the Applicant while charges against him of genocide and crimes against humanity were pending; the Applicant's argument that the charges had not yet been proven is therefore not relevant.

4. The Respondent did not base his decision on political considerations or act in bad faith.

5. The Respondent's decision not to renew the Applicant's appointment was not a disciplinary measure.

The Tribunal, having deliberated from 1 to 23 July 2004, now pronounces the following Judgement:

I. The Applicant first joined UNDP in Kigali, Rwanda, in July 1992 and worked there until July 1994. In December 1996, he again joined UNDP as a United Nations Volunteer in Luanda, Angola, where he remained until 31 December 1999.

In 1999, he was accused by one of his ex-colleagues in Rwanda of genocide, a charge which the Applicant strongly refuted, in letters both to the Administrator, UNDP, and the Secretary-General, respectively. Although UNDP assured the Applicant of its concern that "the truth be uncovered and justice served", the record shows no further action taken.

On 10 November 2000, the Applicant joined UNMIK, on an appointment of limited duration under the 300 series, through 30 April 2001. In his letter of appointment it was made clear to him that the appointment was non-career in nature; that it carried no expectancy of renewal; and, under no circumstances, could be extended beyond four years.

On 7 February 2001, the Applicant's supervisor recommended that his contract be extended for six months, as he rated his performance as "good". The Applicant expressed his concurrence accordingly.

Approximately one month before the expiration of his contract, on 15 March 2001, the First Deputy Prosecutor at the Court of First Instance of Kigali, Rwanda, issued an international arrest warrant against the Applicant charging him with crimes against humanity, and seeking his extradition. On 11 April, the Secretary-General waived the immunity of the Applicant and he was arrested and placed in custody of

UNMIK police. The following day, a Judge at the District Court in Gjilan, Kosovo, while finding that no evidence of the alleged crimes had been established, ordered the Applicant's provisional detention for 30 days, which was later extended.

Around the same time, an article appeared in a United Kingdom newspaper "The Independent", which identified the Applicant by name and position. Citing a United Nations spokesman, it reported details of his arrest and claimed that he had tried to conceal his past service with UNDP by falsifying his application for employment in Kosovo.

On 24 April 2001, the Applicant was informed that his contract would not be renewed "given the present circumstances, particularly the nature of the allegations against [him]".

On 19 June 2001, having found that the Rwandan Government had not provided sufficient evidence to support a reasonable suspicion that the Applicant committed the crimes in question and that none of the witnesses had actually seen the Applicant commit any crimes, the District Court in Kosovo denied the petition to extradite him and ordered his release from detention.

On 26 June 2001, the Applicant requested that he be paid his salary for the month of April, while he was detained, and "subsequent months" and that he be rehired. On 7 September, the Chief Civilian Personnel Officer, UNMIK, advised the Applicant that, as he still faced charges of genocide and crimes against humanity in his country of nationality, it would not be in the interest of the United Nations to rehire him until this matter was resolved, either by the charges being dismissed by the Rwandan Court or withdrawn by the Government. If that should occur, UNMIK's decision would be reconsidered.

After administrative review proceedings, the Applicant lodged an appeal with the JAB, which unanimously recommended compensation in the amount of six months' net base salary plus the unpaid month of April while in detention, a recommendation which was not accepted by the Secretary-General.

II. The Tribunal notes that the Applicant's letter of appointment specified that the appointment was non-career in nature and carried no expectancy of renewal.

It is a well-established rule of the internal law of the United Nations that fixed-term contracts do not carry any expectancy of renewal and the Tribunal has consistently upheld the application of this rule. (See Judgements No. 205, *El-Naggar* (1975) and No. 1057, *Da Silva* (2002).) The Tribunal's jurisprudence is particularly to

the point in the present case, as the Applicant was so advised from the moment he joined UNMIK, and in very clear terms.

However, the Tribunal has also repeatedly held that such expectancy may be created by countervailing circumstances. (See Judgement No. 885, *Handelsman* (1998).) Thus, while the Organization does not need to give any reasons for non-renewal of a fixed-term contract, when the Respondent chooses to give reasons for not renewing a contract, the validity and acceptability of those reasons in a Rule of Law society must be reviewed: the Respondent's decision must not be tainted by forms of abuse of power such as violation of the principle of good faith in dealing with staff, prejudice or arbitrariness. A case in point is Judgement No. 1003, *Shasha'a* (2001), where the Tribunal held that

> "when the Administration gives a justification for this exercise of discretion, the reason must be supported by the facts ... Under such circumstances, the exercise of discretion is examined not under the rule enunciated in Judgement No. 941, *Kiwanuka* (1999) but for consistency between the reason offered and the evidence."

When a review results in a finding of abuse of discretion, rescission of the decision or compensation of the staff member whose contract is not renewed is warranted.

In the present case, the Applicant received a positive performance evaluation from his supervisor, and a recommendation was made to renew his contract for six months. Subsequently, following his arrest, he was advised that in view of his "present" circumstances, particularly the nature of the allegations made against him, it would not be in the interest of the Organization to grant him a further extension upon the expiration of his appointment. The Administration advised the Applicant of its decision twice, the first time on 24 April 2001, i.e., before the Kosovo Court's decision of 19 June, and it repeated its position on 7 September, when the matter was closed at the Kosovo level.

Moreover, the Tribunal notes that the Administration, instead of relying on the decision of the Kosovo District Court which stated clearly that the case against the Applicant could not stand on the merits, decided instead to subject itself to potential decisions from a national Court or to future actions on the part of the Rwandan Government. The Applicant was advised that he would not be rehired by the United Nations unless he was cleared of all charges at the Rwandan national level, in line with the decision of the Kosovo Court which was based on international standards. In the Tribunal's opinion, this situation is similar to that in its earlier Judgement No. 951, *Al-*

Khatib (2000), where it wondered whether the Respondent "decided to consider [the Applicant's] employment on the basis that he was probably guilty but that this had not been proven".

In addition, the Tribunal notes the pre-emptive and possibly harmful action taken by the Administration when an article appeared in an English newspaper, citing a United Nations spokesman, reporting details of the Applicant's arrest and claiming that he had concealed his prior employment with UNDP when applying for his position with UNMIK, only days after the Applicant had been arrested and the case was pending before the Kosovo Court. This left the Applicant, still a United Nations staff member, totally exposed. Finally, the Administration did not pay the Applicant for the month of April when he was in detention, even though his contract did not expire until the end of the month.

III. The Tribunal now turns its attention to the Applicant's claims that in his case the Administration failed to apply the policies for arrested/detained staff, which policies are outlined in a document drafted in 1987 by the Chief, Rules and Personnel Manual Section, entitled Guidelines on "Arrested, Detained or Imprisoned Staff Members: Administrative, Contractual and Disciplinary Issues". This document contains guidelines to be followed by the Administration in such cases, including whether the staff member's immunity should be waived as well as a provision that the staff member may be placed on special leave with pay, while the case is under consideration. Apparently, the Guidelines were never officially adopted.

The Applicant brings to the attention of the Tribunal other cases where it seems that that document of 1987 was applied by the Administration. As both parties agree that that document was never adopted among those determining officially the policies of the Organization in cases of detention, the Tribunal finds that it is not among the sources of legality of the administrative action of the Organization. The Tribunal notes that when the Administration admits that a document, be it not officially adopted, was followed and applied for a series of years as an administrative practice, this might have legal consequences in cases where the same Administration decides not to follow the said practices, especially in terms of compensation. However, in the present case, the Tribunal finds that it does not need to discuss possible consequences of the application of the Guidelines in other cases, especially because there is another document, which has been enforced and is regulating issues like the one under consideration. This is administrative instruction ST/AI/299 of 10 December 1982

entitled "Reporting of arrest or detention of staff members, other agents of the United Nations and members of their families". In addition, the Tribunal is of the view that the wording of the Guidelines does not necessarily lead to the conclusions sought after by the Applicant.

That administrative instruction makes a fundamental distinction between words spoken or acts performed within a staff member's official capacity, and those performed in their personal capacity.

With regard to the waiving of the Applicant's immunity, the Tribunal notes that, when the extradition of the Applicant was requested by the Rwandan authorities, the original arrest warrant was hand-delivered to the Under-Secretary-General for Legal Affairs (The Legal Counsel), who subsequently had it delivered to the Legal Adviser, UNMIK, with extensive information as to how the immunity aspect should be dealt with. According to The Legal Counsel, as the crimes charged to the Applicant were not meant to have been committed in his official capacity as a United Nations staff member, if the allegations against him were founded, waiver by the Secretary-General of any privileges and immunities would be appropriate. The arrest warrant was brought, through the appropriate channels, to the attention of the Secretary-General, who subsequently decided to grant the request for waiver of immunity. The Tribunal cannot but conclude that the appropriate procedures were followed in this regard.

Finally, the Tribunal turns its attention to Annex B of the above-mentioned Guidelines of 1987, which, although used as a document of reference, was never adopted. The Tribunal wants to examine what the difference would be for the present case, should that document have been followed and applied. It is stated there that even when a staff member is in detention for acts committed outside his/her official capacity, as in the present case, that staff member should stay on special leave with pay for a period up to three months, etc. Then the Guidelines provide as follows:

> "If the staff member holds a fixed-term appointment, whether internationally or locally recruited, the contract should be renewed until proceedings at the court of first instance have been completed, subject to the provisions stated above concerning special leave with full, half or no pay ... However, if prior to the arrest or detention a decision had been made to allow a contract to expire, or an appointment to be terminated, though not implemented as of the date on which the arrest was reported, such decision should not be suspended on account of the arrest".

In other words, it is not necessarily so that, had the Administration applied those Guidelines in the present case, the outcome would have been different for the Applicant.

Indeed, the Tribunal finds that the terms of the Guidelines of 1987, even if it were admitted that they are the Law of the Organization, cannot be followed and applied in the present case literally for what concerns the obligation of renewal of the fixed-term contract and this for a number of reasons: first of all, because the way the Guidelines themselves are written leaves the Administration room for flexibility; and, secondly, because of the fact that, although the present case does not come exactly under the flexible wording cited above, the very nature of the contract and the strict non-renewal warnings given to the Applicant at the time of the stipulation of his contract in combination with the fact that the contract is one of the 300 series of the Staff Regulations and Rules, do not lead to a renewal of the contract because of detention. After all, in the Notes under Annex I of ST/AI/299 - the one that has indeed binding force - only officials under 100 and 200 Series are mentioned as staff members.

IV. In view of the above, the Tribunal finds that the surrounding circumstances of the case give rise to a legal expectancy of renewal of contract, as the reasons given to the Applicant for non-renewal vitiated the Respondent's discretion in that the Respondent held a possible future guilty verdict against someone before trial. The Tribunal notes indeed, in this regard, that, on 11 September 2002, the Prosecutor of the International Criminal Tribunal for Rwanda dismissed the Applicant's case - which had been brought to that Tribunal on 4 May 2001 - for lack of evidence. However, the Tribunal is of the view that under the circumstances of the present case, quashing the decision altogether and ordering reinstatement would have no practical effect for the Applicant, as his fixed-term contract expired in 1998 (see Judgement No. 1058, *Ch'ng* (2002)).

Furthermore, the Tribunal finds that in the present case, the Administration severely harmed the Applicant as it seems that unverified statements to the press were made by way of a United Nations spokesman, before the case was decided upon.

Finally, the Tribunal would expect the Administration in difficult and delicate circumstances like the present ones, at least not to contribute to a staff member's woes, or add to his/her difficulties. In fact, although it is understood that the United Nations was undoubtedly shocked to learn that one of its employees was charged with crimes

of genocide, the Administration is always bound to balance its interest to keep the reputation of the Organization at the highest possible level, with the need to respect the dignity of its staff members and indeed see that this dignity is safeguarded until they are found guilty by a Court of Law. At this point, the wording of staff regulation 1.2(c) must be recalled:

> "[T]he Secretary-General shall seek to ensure, having regard to the circumstances, that all the necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them".

The Tribunal, therefore, decides to order compensation in view of its findings.

V. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant as compensation the amount of twelve months' net base salary as of the date of his separation from the Organization, plus the unpaid last month of his employment, if not paid already;
2. Rejects all other pleas.

(*Signatures*)

Brigitte **Stern**
Vice-President, presiding

Omer Youssif **Bireedo**
Member

Spyridon **Flogaitis**
Member

Geneva, 23 July 2004

Maritza **Struyvenberg**
Executive Secretary